No. 19-36020

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN DOE #1, *et al.*,

Plaintiffs-Appellees,

v.

DONALD TRUMP, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Oregon

REPLY IN SUPPORT OF APPELLANTS' URGENT MOTION UNDER CIRCUIT RULE 27-3(b) FOR STAY PENDING APPEAL

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INTRODUCTION

This Court should stay the order enjoining Proclamation 9945. The Proclamation is a valid exercise of the President's "broad discretion to suspend the entry of aliens into the United States." *Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018). As Judge Bress explained, "[t]he district court's extraordinary injunction ignores governing precedent, invents unjustified restrictions on the political branches, and inserts the courts into the President's well-established constitutional and statutory prerogative to place limits on persons entering this country." Admin. Stay Order at 4-5 (Bress, J., dissenting). The government is likely to succeed on appeal and is suffering irreparable harm, and the balance of harms weighs in the government's favor.

ARGUMENT

I. The government is likely to succeed on appeal.

A. The Proclamation is a valid exercise of 8 U.S.C. § 1182(f).

Pursuant to § 1182(f), the President may impose "any restrictions he may deem to be appropriate" on the entry of aliens whose entry he finds "would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f). Section 1182(f) "exudes deference to the President" and "entrusts to the President the decisions whether and when to suspend entry," and "on what conditions." *Hawaii*, 138 S. Ct. at 2408. The President lawfully exercised this authority after "find[ing]

that the unrestricted immigrant entry" of "thousands of aliens who have not demonstrated any ability to pay for their healthcare costs" would "be detrimental to the interests of the United States." 84 Fed. Reg. 53,991.

Plaintiffs argue that the Proclamation is "not supported by findings about the targeted class and the President's bare conclusions about healthcare economics are owed no deference." Opp. 14. However, the Proclamation sets out the President's straightforward justification: recent immigrants are three times more likely than U.S. citizens to lack health insurance. 84 Fed. Reg. 53,991. Plaintiffs do not dispute that fact, and it sufficiently supports the restriction, ensuring immigrants carry insurance or have sufficient financial resources to reduce uncovered healthcare costs. Mot. 1-5.

Importantly, *Hawaii* made clear that plaintiffs cannot attack the sufficiency of findings in a Presidential Proclamation. 138 S. Ct. at 2409 (deeming "questionable" argument that President must "explain [his] finding[s]"). The Supreme Court also emphasized that, "even assuming that some form of review is appropriate," that proclamation (like the one here) contained more detailed findings than prior proclamations. *Id.* (citing "one sentence" and "five sentence" explanations in prior Proclamations). A more "searching inquiry" into the findings "is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere." *Id.* Plaintiffs cannot challenge the

Proclamation based on their "perception of its effectiveness and wisdom," *id.* at 2422, and the President is not required to "conclusively link all of the pieces in the puzzle before [courts] grant weight to [his] empirical conclusions," *id.* at 2409.[1]

B. The nondelegation doctrine does not apply here.

The district court's ruling is based on an "unprecedented" application of the nondelegation doctrine to strike down a federal statute as unconstitutional. Bress Op. 7. That decision directly contradicts recent Supreme Court decisions, including *Hawaii*, which upheld § 1182(f)'s "comprehensive delegation" to the President against a nondelegation challenge. Bress Op. 8.

Plaintiffs do not meaningfully respond to this problem with the injunction. Instead, they cite cases dealing generally with delegation in other contexts. Opp. 16 (citing *Clinton v. City of New York*, 524 U.S. 417 (1998) (Line Item Veto Act); *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001) (Clean Air Act); *Paul v. United States*, 140 S. Ct. 342 (2019) (Sex Offender Registration and Notification Act (SORNA)); *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (SORNA and "powers which are strictly and exclusively legislative")). None of those cases dealt with immigration or foreign affairs, and their reasoning is therefore

[1] The President's authority under § 1185(a)(1), also exercised here, *see* 84 Fed. Reg. 53,991, requires no specific findings.

inapplicable here. Mot. 9-14. As Judge Bress explained, the President's power over "'exclusion of aliens is a fundamental act of sovereignty'" "'inherent in the executive power to control the foreign affairs of the nation.'" Bress Op. 7-8 (quoting *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950)). "[I]n this field," Congress need not "lay down narrowly definite standards by which the President is to be governed," *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304, 320-22 (1936); *see also* Mot. 9-11.[2]

Because the Proclamation applies to individuals seeking entry following consular interviews abroad, *see* Mot. 13, there is no merit to Plaintiffs' argument that the Proclamation does not relate to foreign affairs. Regulation of entry of noncitizens is itself a foreign-affairs role of the Executive that eliminates any nondelegation concern. *See Knauff*, 338 U.S. at 542.

Contrary to Plaintiffs' contention, the exclusion of noncitizens from abroad does not become *solely* a domestic-policy issue simply because their entry would impose harms within the United States. Section 1182(f) speaks to aliens whose entry *into* the United States would be detrimental, so the harm being addressed often will occur domestically. *See, e.g.*, *Hawaii*, 138 S. Ct. at 2404 (upholding

[2] Plaintiffs rely heavily on Justice Gorsuch's dissent in *Gundy*, but that dissent explicitly distinguishes cases dealing with "foreign affairs powers," which "are constitutionally vested in the president under Article II," so there is "no separation-of-powers problem" with "a congressional statute [that] confers wide discretion to the executive." 139 S. Ct. at 2137 (citing *Curtiss-Wright*).

restriction on entry of noncitizens who could pose a threat to individuals *within* the United States). Other proclamations also have restricted entry to advance domestic interests, *see* Mot. 13, so Plaintiffs' identification of proclamations that may relate to foreign affairs in additional ways, Opp. 9, is irrelevant. And there is no merit to the claim that the President's power concerning immigrants is limited solely to authority that Congress gives, Opp. 10; the President has independent constitutional authority to exclude aliens, *Knauff*, 338 U.S. at 542, and in any case, here he also exercised authority Congress provided in § 1182(f). *Hawaii*, 138 S. Ct. at 2424 (Thomas, J., concurring) (Section 1182(f) "does not set forth any judicially enforceable limits that constrain the President," "[n]or could it, since the President has *inherent* authority to exclude aliens from the country").

C. The Proclamation does not conflict with the INA or any other statute.

Plaintiffs argue that the Proclamation conflicts with the "'implied will of Congress' in the INA, healthcare laws, and the VAWA," Opp. 11, because they say "Congress constrained executive power in the same sphere," Opp. 15. But *Hawaii* rejected this argument, holding that "§ 1182(f) vests the President with 'ample power' to impose entry restrictions *in addition* to those elsewhere enumerated in the INA." 138 S. Ct. at 2408 (emphasis added); Mot. 14-16.

Plaintiffs argue that the Proclamation conflicts with the totality-of-circumstances test for "public charge" inadmissibility in § 1182(a)(4), which they

say "expresses congressional judgment about how to assess whether an intending immigrant could become a financial burden." Opp. 3, 11-12. But the Proclamation has no impact on § 1182(a)(4), and consular officers still must apply that provision when considering a visa application. *See* 84 Fed. Reg. 53,993. Section 1182(f), which Congress included in the same statute, permits the President to restrict entry of noncitizens who would not otherwise be inadmissible. Mot. 14-17. As Judge Bress recognized (Op. 10-11), the Proclamation establishes an additional limit on entry based on harms that are not explicitly addressed by the public charge provision—the high rate at which new immigrants lack healthcare coverage, uncompensated healthcare costs borne by private healthcare providers, and a burden on emergency services. 84 Fed. Reg. 53,991. As this Court recently noted, the public charge provision does not address impacts on private entities, as it has long been based on whether a noncitizen is likely to require "services from the government," a "government benefit," or "public support." *City & Cty. of San Francisco v. USCIS*, No. 19-17213, 2019 WL 6726131, at *15-16 (9th Cir. Dec. 5, 2019) ("*San Francisco*"). Because § 1182(f) permits the President to restrict entry for different reasons and in different ways, Plaintiffs' argument that the Proclamation does not exempt categories of noncitizens who may be exempt from the public charge ground of inadmissibility, Opp. 13, is also of no import.

Finally, Plaintiffs argue that the Proclamation conflicts with the ACA. Opp. 12-13. But this was not a basis for the district court's injunction. Order 33 n.6 (expressing "no opinion . . . whether the Proclamation also contravenes . . . healthcare laws"). Moreover, there is no conflict because it is entirely possible to comply with both the Proclamation and the ACA. "Approved health insurance" under the Proclamation includes ACA-compliant unsubsidized health plans offered in a state's individual market, 84 Fed. Reg. 53,992, as well as other plans that are readily available, and nothing in the Proclamation prevents an immigrant from switching to a different plan, including other ACA-compliant plans, after arriving. That the ACA permits certain immigrants within the United States to receive subsidies does not override the authority § 1182(f) confers on the President to impose "any restrictions [on entry] he may deem appropriate."

II. The balance of harms favors a stay.

The district court's universal injunction causes irreparable harm to the government. First, enjoining the President from taking action effectuating an Act of Congress always imposes irreparable harm. *Cf. Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers). Plaintiffs contend that the Proclamation "does not carry out congressional will," Opp. 17, but as explained above, the Proclamation employs the broad authority Congress granted to the President in § 1182(f).

Moreover, the harm to the national interest identified in the Proclamation will continue for the duration of the injunction. Plaintiffs protest that "there is no evidence the injunction causes any harm" because "recent uninsured immigrants" are only 2.9 percent of all uninsured adults. Opp. 17. That figure is dubious, and Plaintiffs' declarant admits it is based on an analysis that is "not ideal." Opp. Ex. 12, ¶ 17. In any event, 2.9 percent is still significant, especially, as Judge Bress explained, given Plaintiffs' own assertions about the number of people affected. Bress Op. 12. Plaintiffs' statistics also are consistent with the Proclamation's factual underpinning—that newly arriving immigrants lack health insurance at rates far higher than U.S. citizens. Plaintiffs' reliance on *L.A. Mem'l Coliseum Comm'n v. NFL*, 634 F.2d 1197 (9th Cir. 1980), is misplaced. While monetary harm alone typically may not be irreparable, *id*. at 1202, the harm here—allowing individuals who will burden the healthcare industry to immigrate without making minimal plans for their healthcare needs—is much broader, including the "disruption in the provision of emergency services." Bress Op. 12; *see San Francisco*, 2019 WL 6726131, at *25.

Furthermore, the harm is permanent because the Proclamation cannot be applied to immigrants who already have entered the country. Plaintiffs' response that the ACA addresses the Proclamation's concern of requiring immigrants to obtain necessary healthcare coverage, Opp. 18, concedes that the Proclamation and

the ACA have similar goals and both address legitimate concerns. Additionally, Plaintiffs' insistence that the Proclamation will affect a large percentage of "otherwise qualified immigrants," Opp. 12, effectively acknowledges, as Judge Bress explained (Op. 12), that the harm caused by the injunction "is not only irreparable, but significant," *San Francisco*, 2019 WL 6726131, at *24.

The balance of equities favors the government because neither the seven individual Plaintiffs nor the organizational Plaintiff have shown that they face irreparable harm.[3] Mot. 19-20. Tellingly, Plaintiffs have no response and simply contend that this Court "owes deference to the district court findings" on the Proclamation's effect. Opp. 18-19. But their only authority, *Aberdeen & Rockfish R. Co. v. SCRAP*, 409 U.S. 1207 (1972), is inapposite. In *Aberdeen*, one Justice reviewed an injunction issued by a three-judge district court panel, and concluded: "Notwithstanding my doubts of the correctness of the action of the three-judge District Court, as Circuit Justice, acting alone, I incline toward deferring to their collective evaluation and balancing of the equities." *Id*. at 1218. This appeal presents the opposite situation: a three-judge appellate court panel reviewing an injunction issued by a single district judge, as in *San Francisco.* Deference on the

[3] Plaintiffs' assertion that the government "do[es] not even attempt to address the public interest," Opp. 19, is wrong. The government explained that the balance of harms weighs against injunctive relief, Mot. 18-20, and the balance of harms and public interest "merge when the Government is the opposing party," *Nken v. Holder*, 556 U.S. 418, 435 (2009).

impact of the Proclamation is especially unwarranted where the district court "improperly supplanted [its] view for that of the President." Bress Op. 11.

Even if there were some minimal hypothetical harm to Plaintiffs, the government has demonstrated the critical factors—a likelihood of success on the merits and certain irreparable harm. Thus, a stay is in the public interest. *Nken*, 556 U.S. at 434; *San Francisco*, 2019 WL 6726131, at *26.

III. A universal injunction is improper.

This Court should at least narrow the scope of the injunction. Mot. 20-23. The district court did not simply issue a "class-wide" injunction; it issued a universal injunction that extends to individuals outside the putative class.[4] This Court's decisions confirm that a universal preliminary injunction is proper only if necessary to provide relief *to the named plaintiffs themselves*. *California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018); *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 779 (9th Cir. 2018). Here the district court did not tailor the injunction at

[4] When the injunction was issued, Plaintiffs did not have a class representative for their "visa applicant subclass." Mot. 22. Plaintiffs concede this by insisting that their First Amended Complaint now has "at least one representative of each subclass." Opp. 22 n.5. But the amended complaint was untimely and was filed *after* the district court issued the universal injunction based on a putative "U.S. petitioner subclass." Moreover, the new purported named plaintiff, a spouse of a U.S. citizen, is in a far different position than the many intending immigrants covered by the injunction who have no connection to the United States. *Hawaii*, 138 S. Ct. at 2419; *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972).

all and instead relied on alleged harms to non-parties to issue a universal, worldwide injunction.[5]

Every authority Plaintiffs cite supports the government's position that universal injunctions, if permissible at all, are the exception, not the rule. Even this Court's decision in *Hawaii v. Trump*, 878 F.3d 662 (9th Cir. 2017), *rev'd and remanded*, 138 S. Ct. 2392 (2018), found that "a worldwide injunction as to all nationals of the affected countries extends too broadly." *Id*. at 701.[6] And *Regents of Univ. of Cal. v. DHS*, 908 F.3d 476 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 2779 (2019), allowed a nationwide injunction where it was unclear how to narrow the injunction. Plaintiffs here cannot explain why an injunction could not be tailored to the individual named plaintiffs and the specifically identified clients of the organizational plaintiff.

CONCLUSION

The government respectfully requests that this Court stay, or at least narrow, the district court's injunction pending appeal.

[5] Even the unpublished, two-paragraph order Plaintiffs rely on, *Just Film, Inc. v. Merchant Servs., Inc.*, 474 F. App'x 493 (9th Cir. 2012), emphasized that the injunction at issue had been "carefully tailored."

[6] The Supreme Court also stayed that preliminary injunction pending appeal before later reversing it. *Trump v. Hawaii*, 138 S. Ct. 542 (2017).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 2,577 words. This brief complies with the typeface and the type-style requirements of Federal Rule of Appellate Procedure 27(d)(1) because it has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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